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Fred C. Zacharias  
*University of San Diego*

Shaun Martin  
*University of San Diego*

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# Coaching Witnesses

BY FRED C. ZACHARIAS\*  
& SHAUN MARTIN\*\*

## INTRODUCTION

The focus of this symposium, as it was described to us, was to “highlight recurring questions and dilemmas that arise as lawyers try (and sometimes fail) to conduct their trial work within ethical boundaries established by court rules, ethical codes, and other statutes.”<sup>1</sup> In this short piece, we suggest that the problems in ethical lawyering often develop because lawyers think about issues in precisely those terms; namely, how their intended conduct fits within the confines of rules, codes, and statutes. Although we all yearn for bright-line rules that tell us how to conduct our affairs, it is clear that ethics regulation tolerates a range of conduct. The propriety of particular litigation activities within the relatively broad regulatory strictures typically depends not on the precise content of the ethics rules themselves, but rather upon the reasons for which lawyers act.

We take as the vehicle for discussing this proposition the issue of coaching witnesses.<sup>2</sup> In our Professional Responsibility

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\* Professor, University of San Diego School of Law, San Diego, California. B.A. 1974, Johns Hopkins University; J.D. 1977, Yale University; LL.M. 1981, Georgetown University.

\*\* Associate Professor, University of San Diego School of Law, San Diego, California. A.B. 1988, Dartmouth College; J.D. 1991, Harvard University.

<sup>1</sup> Letter from Susan David Dwyer, Special Projects Editor, *Kentucky Law Journal*, to Fred C. Zacharias, Professor, University of San Diego School of Law (July 1, 1998) (on file with author).

<sup>2</sup> Although many commentators have touched on this subject, only a few have directly addressed the ethics of witness preparation. See, e.g., John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277 (1989) (arguing that the appropriateness of particular conduct depends upon a fact-specific evaluation of what the adversary system requires); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995) (arguing that a lawyer's permissible authority to affect

courses,<sup>3</sup> we sometimes show our students clips from two videotapes involving witness preparation. The first, from the movie *The Verdict*,<sup>4</sup> involves the preparation of a defendant anesthesiologist who allegedly committed malpractice.<sup>5</sup> The defendant is coached by a team of large-firm partners and associates. Initially, the doctor's responses to his lawyer's direct examination questions are stiff, patronizing, and clinical.<sup>6</sup> After forceful prompting, however, the doctor is convinced to talk in emotional, human terms that suggest his caring nature and superhuman efforts on his patient's behalf.<sup>7</sup> His lawyers accomplish this transformation by pressing

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witness testimony through preparation is narrow); Joseph D. Piorkowski, Jr., Note, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 GEO. J. LEGAL ETHICS 389 (1987) (urging lawyers to consider their ethical responsibilities); see also, e.g., GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 127-31 (1978) (discussing the intersection of witness preparation and the subornation of perjury). The paucity of attention to this subject is somewhat surprising given that some ethicists believe that the conduct of attorneys in interviewing and preparing witnesses, "more than almost anything else, gives trial lawyers their reputations as purveyors of falsehoods." DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 96 (1988).

<sup>3</sup> The events that we discuss herein are often drawn from the experiences of one or the other of us. We nevertheless take literary license and refer to these activities as "ours."

<sup>4</sup> *THE VERDICT* (20th Century Fox 1982).

<sup>5</sup> In *The Verdict*, a pregnant patient undergoing a routine procedure receives the wrong anesthesia and, as a result, lapses into a fatal coma. James Mason plays the role of a Machiavellian defense lawyer who leads a team of large firm lawyers in defending the anesthesiologist in the resulting medical malpractice action. See *id.*

<sup>6</sup> For example, when first asked what caused his patient to be deprived of oxygen, the doctor responds, "She'd aspirated vomitus into her mask." His attorney, upon hearing the doctor's description, counsels him to "cut the bullshit, please. Just say it. She threw up in her mask." The doctor immediately parrots his lawyer's proposed characterization and responds, "She threw up in her mask." *Id.*

<sup>7</sup> The doctor, for example, starts (at his counsel's urging) to refer to his patient—whom he presumably barely knew—as "Debby" rather than "she" or "the patient." The doctor similarly alters his characterization of his role in the treatment. The doctor initially responded that he was "one of a group" when asked if he was Debby's anesthesiologist. His attorney responds bluntly, "You were not part of a group. You were her anesthesiologist. Isn't that so?" The doctor immediately relents: "Yes." *Id.* The doctor's testimony, after extensive preparation, concludes with his wholehearted adoption of his attorney's characterization of his activities in bringing "30 years of medical experience to bear [on a] patient riddled with

the doctor to adopt substitute terms and phraseology that they suggest and by applauding the witness when he shows his emotions.<sup>8</sup>

In the second tape, from the television series *L.A. Law*,<sup>9</sup> attorney Michael Kuzak converts a similarly clinical character witness who “see[s] shades of gray in everyone”<sup>10</sup> into a one-sided, fully favorable witness.<sup>11</sup> For example, when asked, “[H]ave you ever known [the defendant] to be violent?”, the witness initially responds, “Not really.” Kuzak immediately replies, “The answer is ‘No.’”<sup>12</sup> The witness soon adopts this response. The witness is strongly influenced by Kuzak’s statement that his testimony will be useless unless he can adopt wholeheartedly supportive characterizations.<sup>13</sup> Wanting to help his friend, the witness ultimately incorporates the exact phrases that Kuzak has previously employed in preparing the witness to testify.<sup>14</sup>

Our students typically are unified in their responses to the tapes described above. *The Verdict* lawyer, they say, has done nothing wrong. He has not changed the substance of the testimony but has instead simply shaped it by demonstrating to the witness how he will appear to the jury. The changes in the witness’s testimony, they argue, are simply a matter of

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complications” in an effort to “reach[ ] down into death” and save her. *Id.*

<sup>8</sup> See *supra* notes 6-7. This prodding comes in a fairly intimidating setting in which the lead attorney practices a vigorous and up tempo direct examination with the doctor in front of twelve partners and associates who sit as a mock jury and interject comments. As the pace of the testimony increases, the lead attorney’s reactions seem more like an order or direct substitute for the doctor’s words than a suggestion or explanation of the effect of the doctor’s testimony. See *THE VERDICT*, *supra* note 4.

<sup>9</sup> *L.A. Law* (NBC television broadcast).

<sup>10</sup> *Id.* In this episode, the witness is a humanities professor and the best friend of a colleague accused of murder. The lawyer plans to call the professor as a character witness. The witness wishes to help the defendant, whom he truly likes and admires.

<sup>11</sup> Kuzak is particularly concerned about the witness’s willingness to volunteer that the defendant has previously exhibited a temper and, like many people, has not always gotten along with everyone. See *id.*

<sup>12</sup> *Id.*

<sup>13</sup> Kuzak, after the witness has expressed his unwillingness to perjure himself, states, “I’m not asking you to lie. But if you can’t express your friendship with some conviction, then I can’t put you up there [to testify].” *Id.*

<sup>14</sup> The witness ultimately testifies at trial in seeming direct contradiction to his earlier practice testimony—using the precise language suggested by Kuzak—that the defendant was a “gentle, caring individual” who was “utterly incapable of the brutality with which he’s been charged.” *Id.*

presentation, even though these revisions may have a significant effect on the jury's response. In contrast, the students believe that Kuzak—the *L.A. Law* lawyer—has acted outrageously. He has promoted perjury, the class agrees, because he has in effect changed the story that the witness will tell.

At this point, we push the students to the wall. "What if," we ask, "we write out potential questions and possible answers for a sophisticated witness in a complicated case? We tell the witness that we are not trying to put words in his mouth but, as a starting point for preparing the witness and to save time, we are showing him various questions and answers for his reaction." The students first react scornfully to this proposition and assert that we would be suborning perjury were we to do so. However, the more we repeat that we are willing to accept as correct any account that the witness tells us, the more the students move towards the position that this conduct simply constitutes a legitimate attempt to help the witness's presentation. The law and ethics rules only forbid a lawyer from presenting evidence that she<sup>15</sup> knows to be false.<sup>16</sup> Helping one's client to present the most persuasive case is, after all, the lawyer's job.

Our Socratic questions, of course, reflect more than just hypothetical scenarios. The practice that we describe to our students reflects the actual manner in which lawyers obtain much of the evidence that is presented to tribunals—not only trial evidence. Pretrial affidavits and declarations typically are obtained almost precisely in the way we describe in our final "hypothetical." An attorney prepares a sworn declaration that contains the evidence needed to prevail on a motion and she then forwards this draft submission to an individual—usually her client or an employee—for his review and signature. When forwarding the draft declaration, the attorney may or may not expressly inform the recipient that she is prepared to edit

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<sup>15</sup> To avoid confusion, we refer to the lawyer facing a potential ethical quandary as female and the other actors (e.g., clients, witnesses, opposing counsel) in the process as male.

<sup>16</sup> See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1998) (forbidding a lawyer to "knowingly offer evidence that the lawyer knows to be false").

In referring to "the rules" or "the codes" in this article, we refer to the body of professional regulation that is encompassed by the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980), the MODEL RULES OF PROFESSIONAL CONDUCT (1998), and the state variations of those codes. Because most jurisdictions' codes are similar with respect to the subjects that we discuss, we will not identify specific provisions in the different codes. We will instead confine our references to the most commonly adopted version of these provisions, the Model Rules.

the draft to comport with the objective truth. In any event, she is, in fact, quite willing to do so.

Whether or not the lawyer makes any such express statement about the fungible nature of the draft, declarants ordinarily sign and return the affidavit provided to them with no (or only insubstantial) changes. The court accordingly receives evidence that is in reality the lawyer's own carefully crafted submission. The *L.A. Law* clip and the prepared testimony hypothetical thus parallel, in dramatic form, the type of witness coaching that routinely occurs in the practice of even the most well-respected of attorneys.

The students' responses to our hypothetical scenarios similarly parallel the approach of many real world litigators. These individuals often focus exclusively upon the fact that the ethics rules forbid directly only the knowing subornation of perjury.<sup>17</sup> The hasty conclusion too often drawn by these litigators is that a lawyer acts ethically so long as her coaching or declaration-drafting practices would not be viewed, under criminal law principles, as the deliberate subornation of perjury. Everything else, they believe, merely entails a permissible attempt to put the evidence in its most favorable light.

Our classroom dialogue exposes these common assumptions as well as the foundation upon which this symposium is based. A lawyer or student who focuses solely on the content of the rules, codes, and statutes in order to evaluate ethics will conclude automatically that *The Verdict* and declaration-obtaining attorneys act properly in the way they prepare testimony, but that Kuzak may have acted questionably. The codes teach us that a lawyer can neither tell a client to lie nor encourage a witness to commit perjury.<sup>18</sup> However, the lawyer is required to be loyal to the client<sup>19</sup> and to communicate fully with him.<sup>20</sup> The intersection of these ethical provisions presumably entitles the client to know (or to have the witnesses know) how his story will sound on the stand. The codes and rules similarly allow the lawyer to provide clients with efficient, professional assistance in preparing to testify. *Ipso facto*, it seems, even showing the client a

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<sup>17</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3.

<sup>18</sup> See *id.* Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

<sup>19</sup> See *id.* Rule 1.7 cmt. ("Loyalty is an essential element in the lawyer's relationship to a client.").

<sup>20</sup> See *id.* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

preliminary list of questions and answers or a draft declaration in the lawyer's own words is ethically permissible.

But is it? Is showing proposed sworn testimony to an incipient witness any different than the *L.A. Law* lawyer's conduct in pressuring the character witness to change his story by *truthfully* telling the witness that he will not be called to the stand to help his friend if his evaluation of the defendant is mixed? Conversely, is *The Verdict* lawyer's clear effort to change the words that the doctor-witness uses before the jury and the demeanor he projects any more "ethical"? If we are honest about not only the *L.A. Law* and *The Verdict* lawyers, but also the actual practices described above, it seems obvious that the attorney in each instance hopes to convince the witness to say the desired things and to say them in the suggested way. This is the hope even if the proposed testimony may not be true and even if—as is certainly the case—the witnesses would not use the proposed words or present the desired image without the lawyer's intervention.

We trust that these examples show that the terms of the codes themselves do not delimit the contours of proper behavior. The codes instead depend upon lawyers to exercise discretion. More to the point, in litigation situations like those discussed above, any attorney who thinks that she can determine ethical conduct simply by looking at and following the letter of the codes will not even be *trying* to act ethically. The effort must also include deep consideration of what conduct is appropriate and what conduct is not. The correct resolution of ethical issues depends, at least in part, upon the reasons why a lawyer engages, or wishes to engage, in a particular type of coaching.

If that is the case, however, one might expect that a professional code concerned with the advancement of ethical conduct would focus expressly on the lawyer's intent and state of mind. Yet the codes avoid doing so for at least two reasons. First, because intent is a subjective element, the enforcement of intent-based rules is difficult. Second, in most cases, the *effect* of a lawyer's objective conduct on clients, third parties, and the legal system does not depend upon the lawyer's state of mind. The codes accordingly tend to treat that effect (or the nature of the conduct itself) as dispositive, thus making the lawyer's purpose seem irrelevant.<sup>21</sup>

Nevertheless, the true morality of a lawyer's conduct—both whether she has acted properly in a particular case and whether she has adopted an amoral persona or role in pursuing her client's case—inevitably depends heavily upon why the lawyer has acted in a particular way. One can

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<sup>21</sup> See generally MODEL RULES OF PROFESSIONAL CONDUCT.

envision scenarios in which *The Verdict* lawyer, the *L.A. Law* attorney, and the declaration-writing counsel each could be deemed to be either an unprofessional or a reasonable advocate.<sup>22</sup> In our hypothetical (or not so hypothetical) situations, every lawyer can be characterized alternatively as trying to foster perjury or as attempting to educate the witness. The key to how society would view the “ethics” of the attorney’s conduct would depend on why the lawyer chose to act in a particular way, how far she was willing to pursue her conduct, and the nature of her client.<sup>23</sup> It probably

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<sup>22</sup> If, for example, a lawyer is dealing with a witness who has difficulty expressing his ideas, there probably is nothing wrong with helping him to tell his story. *See, e.g.*, CHARLES W WOLFRAM, MODERN LEGAL ETHICS § 12.4.3, at 647-48 (1986) (“Lawyer interviews with witnesses in preparation for testimony have become an accepted and standard practice in the United States.”) (footnote omitted). Similarly, if a witness is unfamiliar with a courtroom or intimidated by the prospect of testifying or being cross-examined, a lawyer reasonably may put the witness at ease by practicing with him or suggesting mechanisms by which he can overcome his nervousness. *See, e.g.*, *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979) (“It is not improper for an attorney to prepare his witness for trial, to explain the applicable law and to go over before trial the attorney’s questions and the witness’[s] answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can.”); Applegate, *supra* note 2, at 298, 322 (discussing valid and potentially invalid justifications for preparing witnesses). It may also be perfectly acceptable for a lawyer to draft a witness’s declaration in the lawyer’s own words in order to expedite its signing or to avoid hearsay or other evidentiary objections that might flow from the witness’s use of his own language.

On the other hand, the more that a lawyer substitutes her own words for the witness’s and the more those substitutions change the facts to which the witness will testify, the greater the risk of suborning perjury or the creation of “false evidence.” *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (forbidding lawyers to “knowingly” introduce false evidence); *id.* Rule 3.3(c) (authorizing lawyers, in their discretion, to refuse to offer evidence that they “reasonably believe” to be false). Some commentators have even suggested that helping to change the demeanor of a witness constitutes impermissible tampering with the underlying evidence every bit as much as helping to change the facts presented. *See, e.g.*, Applegate, *supra* note 2, at 298-99 (discussing problems of “molding” a witness’s demeanor); Piorkowski, *supra* note 2, at 404-05 (discussing when influencing demeanor may be tantamount to changing the facts).

<sup>23</sup> Compare, for example, a lawyer who observes in passing to a witness that “Your testimony isn’t very persuasive,” with a lawyer who makes the same observation with a wink.



would not depend primarily on what the rules say about the particular conduct at issue.

Our point, of course, is not that lawyers should ignore the professional codes. In the coaching context, for example, the rules contain many express, binding, and useful commands. Lawyers may not assist a client in committing illegality (*e.g.*, perjury).<sup>24</sup> A lawyer also may not knowingly offer false evidence<sup>25</sup> or “fail to disclose” information necessary to avoid assisting a client’s fraud.<sup>26</sup> Nor may lawyers use third parties (including witnesses) to do that which they could not do themselves.<sup>27</sup>

The rules simultaneously grant lawyers a significant degree of potentially countervailing discretion. The codes establish that lawyers, rather than clients, control technical or “tactical” decisions.<sup>28</sup> But lawyers must nevertheless act loyally to their clients.<sup>29</sup> Lawyers should also not overly judge or control their clients’ activities.<sup>30</sup>

The express commands in the rules also are supplemented by teachings of more general application. Lawyers are to retain independent judgment.<sup>31</sup> They must avoid “conduct involving dishonesty, fraud, deceit or mis-

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<sup>24</sup> See, *e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (forbidding counseling or assisting a client in illegal conduct).

<sup>25</sup> See *id.* Rule 3.3(a)(4).

<sup>26</sup> *Id.* Rule 3.3(a)(2).

<sup>27</sup> See, *e.g.*, *id.* Rule 8.4(a) (“It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct . . . or do so through the acts of another.”).

<sup>28</sup> See, *e.g.*, *id.* Rule 1.2(a) (allocating to lawyers control over the “means by which [client objectives] are to be pursued.”).

<sup>29</sup> See, *e.g.*, *id.* Rule 1.7 cmt. (discussing loyalty); Rule 1.6 (adopting a strict rule of confidentiality).

<sup>30</sup> For example, lawyers are only required to remedy client misconduct towards a tribunal when they “know” that misconduct has occurred. See *id.* Rule 3.3(a); *cf.* *id.* Rule 3.3(c) (granting a lawyer discretion not to introduce evidence that she “reasonably believes is false.”).

<sup>31</sup> The codes accordingly give lawyers control over certain decisions and suggest that lawyers may refrain from obtaining every potential benefit available to their client. See, *e.g.*, *id.* Rule 1.2 (giving lawyers control over the means of litigation); *id.* Rule 1.2 cmt. (giving lawyers discretion not to press advantages). The codes accord lawyers discretion to act, or not to act, in numerous other situations as well. See, *e.g.*, *id.* Rule 1.6(b) (setting forth exceptions to confidentiality); *id.* Rule 3.3(c) (giving lawyers discretion not to use certain evidence). See generally Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995) (describing lawyers’ general reactions to the discretionary authority granted in the professional codes).

representation.”<sup>32</sup> Lawyers have conflicting obligations to clients and the courts.<sup>33</sup> Attorneys sometimes must consider third party or societal interests that are superior to their clients’<sup>34</sup> For witness testimony, in particular, the codes give each lawyer discretion to “refuse to offer evidence that the lawyer reasonably believes is false.”<sup>35</sup> The import of these provisions is that while attorneys should give weight to values incorporated into the codes (such as partisanship and loyalty), they cannot rely on them as a means of avoiding the exercise of moral discretion.

How can such discretion be exercised, to take our example, in the coaching context? The lawyer’s justification for her conduct cannot alone provide the answer. In every case, after all, a lawyer could rationalize her efforts in perfecting a witness’s presentation as driven by the laudable goal of being loyal to her client.

The key, as one of us has suggested before,<sup>36</sup> lies in the lawyer’s maintenance of objectivity. Attorneys coach clients in every case, both before and during trial.<sup>37</sup> Under the American adversary sys-

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<sup>32</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c).

<sup>33</sup> See, e.g., *id.* Rule 3.3 (describing lawyers’ obligations to tribunals).

<sup>34</sup> See, e.g., *id.* Rules 1.6, 3.3(b) (establishing exceptions to strict confidentiality).

<sup>35</sup> *Id.* Rule 3.3(c).

<sup>36</sup> See Zacharias, *supra* note 31 (discussing the reaction of lawyers to the availability of discretion in the codes).

<sup>37</sup> Lawyers would be remiss if they did not prepare their witnesses for the pressures of the courtroom and the tricks of cross-examination. See ROBERTO ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL § 1.01 (Trial Practice Series 1988) (arguing that the preparation of witnesses is the most important aspect of trial advocacy); Applegate, *supra* note 2, at 289 (“The obligation to prepare [witnesses] is clear from the duties of competence and zealousness, however, the extent of that obligation is not clear.”). In the view of at least some commentators, such preparation typically should include “possible ways in which the witness might respond to [argumentative] questions.” John G. Koeltl & Paul C. Palmer, *Preparing A Witness to Testify: Addendum*, in LITIGATION 5, 36 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5135, 1992); cf. Wydick, *supra* note 2, at 52 (arguing that witness preparation should be designed to minimize its effect on the facts the witness will describe).

To be realistic, lawyers inevitably affect witnesses’ testimony, at least to some extent, when the lawyers speak to witnesses in the course of gathering evidence. In practice, therefore, lawyers can begin the process of preparing the witnesses for trial at the investigation stage. See, e.g., MARVIN E. FRANKEL, PARTISAN JUSTICE 15 (1980) (“[E]very lawyer knows that the ‘preparing’ of witnesses may embrace a multitude of other measures, including some ethical lapses believed to be more

tem,<sup>38</sup> there is nothing wrong with helping a witness to make his point clearly, or even in noting truthful, useful observations that the witness might make.<sup>39</sup> Indeed, the very foundation of the adversarial process is the belief that the presence of partisan lawyers will sharpen the presentation of the issues for judicial resolution.<sup>40</sup> The less sophisticated or experienced the client, the more he needs such assistance.<sup>41</sup>

The primary danger of coaching is the possibility that a lawyer may so change a witness's presentation that the resulting testimony is either false or conveys an incorrect impression about the facts that cross-examination

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common than we would wish. [T]he process often extends beyond helping [to] organize what the witness knows, and moves in the direction of helping the witness to know new things.”); Wydick, *supra* note 2, at 9-11 (discussing ways in which lawyers may affect witness testimony).

<sup>38</sup> Lawyers in other countries, by contrast, find the very notion of preparing witnesses abhorrent. See Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 FORDHAM INT'L L.J. 1239, 1249-50 n.37 (1998) (describing the Australian view that preparing witnesses is unethical and the Canadian view that it is illegal). In England, barristers typically do not even interview witnesses before trial. See, e.g., Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 435 (1992); Karen L.K. Miller, *Zip to Nil? A Comparison of American and English Lawyers' Standards of Professional Conduct*, in CIVIL PRACTICE AND LITIGATION TECHNIQUES IN THE FEDERAL COURTS 199, 204 (A.L.I.-A.B.A. Continuing Legal Educ. 1995).

<sup>39</sup> See JEFFREY L. KESTLER, QUESTIONING TECHNIQUES AND TACTICS §§ 9.02, 9.04, 9.31 (Trial Practice Series 1992) (noting ways in which witness preparation is important to the adversary system); cf. Wydick, *supra* note 2, at 12 (noting the responsibility of an adversarial lawyer to present the relevant material in a “coherent and convincing manner”).

<sup>40</sup> See Applegate, *supra* note 2, at 340-41 (noting ways in which witness preparation supports the theory of adversarial advocacy); cf. Lon Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 31 (Harold J. Berman ed., 1961) (“The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation.”). See generally Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 54-55 (1991) (identifying the theory of the adversary system).

<sup>41</sup> See, e.g., ARON & ROSNER, *supra* note 37, at 84; Koeltl & Palmer, *supra* note 37, at 22 (noting factors that influence the need for pre-deposition witness preparation).

cannot counteract.<sup>42</sup> Different clients require different levels of assistance in formulating and expressing their thoughts. A lawyer who maintains objectivity nevertheless can recognize two ethical red flags in the course of coaching a client or witness. First, an attorney can notice that she is, in fact, suggesting changes in the witness's presentation for the purpose of obtaining false evidence.<sup>43</sup> Second, she can notice that the changes she suggests are either inconsistent with previous information the witness has provided or are uniformly adopted by the witness without question. Either signals the possibility that the lawyer, perhaps even inadvertently, may be inducing false evidence.

Let us suppose that the self-aware lawyer observes one of these signals. On a rigid reading of the rules, the lawyer could conclude that she nevertheless still does not "know" that any false evidence exists and that loyalty to her client thus militates in favor of using the altered testimony.<sup>44</sup> An approach that requires the lawyer to consider the spirit of the codes as well, however, would require the lawyer to discuss these developments with her client<sup>45</sup> and to consider a refusal to use the evidence.<sup>46</sup> In the end,

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<sup>42</sup> Model Rule 3.3 makes clear that the production of false evidence is an evil that the code drafters wish lawyers to avoid. However, the codes preclude lawyers from introducing such evidence only in situations in which a lawyer "knows" that this evidence is false. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1998).

<sup>43</sup> The codes suggest only a distinction between "knowing" and "unknowing" presentation of false evidence. See *id.* Rule 3.3. By contrast, the distinction we suggest here is between inadvertently and intentionally trying (or hoping) to produce false evidence.

<sup>44</sup> We assume, for purposes of this discussion, that the use of false evidence would be tactically wise in the particular case. Cf. HAZARD, *supra* note 2, at 129-30 (discussing the questionable conclusion that cross-examination will ferret out false testimony).

<sup>45</sup> The Model Rules expressly require lawyers to discuss "the status of a matter" with clients, but only vaguely suggest that the lawyer discuss moral issues as well. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(a). Compare *id.* Rule 1.4 (requiring communication with clients) with *id.* Rule 2.1 (requiring lawyers to "exercise independent professional judgment and render candid advice"). To the extent the rules encourage attorneys to engage in moral discourse with clients, they do so by giving lawyers discretion in certain situations and by noting the existence of the sometimes conflicting values of client autonomy, the interests of third parties, and the goals of courts and the legal system. See Zacharias, *supra* note 31, at 1357-62 (discussing moral discourse between lawyers and clients).

<sup>46</sup> The Model Rules give lawyers discretion in this area, but neither require active consideration of this option nor provide guidelines as to when its utilization

the “tactical” decision of how to prepare the witness and what testimony to use is one upon which a lawyer must actively reflect.<sup>47</sup>

Let us consider another example from the real world as typical of the type of ethical considerations that attorneys should address. A standard probation condition imposed upon conviction for alcohol-related crimes in California requires the recipient to participate in Alcoholics Anonymous.<sup>48</sup> The difficulty engendered by this condition is that Alcoholics Anonymous meetings are (as the name implies) anonymous. Alcoholics Anonymous provides a sign-in sheet that probationers can complete in order to indicate their attendance. This list, however, only indicates the individual’s initial presence; it does not reflect whether the person signing the list actually attended the full meeting.

Many California probationers were believed to exploit this loophole by presenting sign-in sheets to the court as evidence of their attendance even when they had not, in fact, obtained the benefits of their required participation. Various California judges, upon learning of this problem, devised a solution: they began to “quiz” probationers when they appeared before the court to establish the completion of the terms of their probation. Judges typically asked the defendant “What step are you on?” a question that any true participant in Alcoholics Anonymous would easily be able to answer.

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would be appropriate. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4). Lawyers thus may well follow personal or financial incentives in the exercise of their discretion. *See, e.g.,* Zacharias, *supra* note 31, at 1327-50 (discussing various lawyer-based incentives, as opposed to client-based ones, that may affect the exercise of discretion).

<sup>47</sup> *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (allocating to lawyers the decision making authority over the means employed in litigation).

It is beyond the scope of this Article to identify the precise methods that attorneys should use to divine ethical conduct in the coaching context. Others have begun that process. John Applegate, for example, “suggests that the appropriateness of any witness preparation technique should depend on whether the structure of the adversary system requires such a technique in the particular context in which it is employed.” Applegate, *supra* note 2, at 282. Richard Wydick goes further and argues that a lawyer must prepare a witness “in the manner least likely to harm the quality of the witness’s testimony.” Wydick, *supra* note 2, at 52. Joseph Piorkowski takes the more preliminary approach—consistent with this Article’s precepts—that lawyers should consider “whether their witness preparation techniques may have the effect of inducing a witness to falsify or misrepresent material facts, either expressly through actual testimony or implicitly through demeanor.” Piorkowski, *supra* note 2, at 390.

<sup>48</sup> *See, e.g.,* CAL. VEHICLE CODE § 13352, 13352.5 (Deering 1999).

This simple judicial inquiry often resulted in a bewildered look on the part of the probationer and a resulting order for the continuation of probation.<sup>49</sup>

California public defenders—as repeat players in the process—became aware of this practice contemporaneously with its development. They were forced to consider their appropriate response. Public defenders, like all attorneys, have a duty of loyalty to their clients.<sup>50</sup> Simultaneously, however, lawyers have both a legal and ethical duty not to suborn perjury.<sup>51</sup> These competing principles manifested themselves in the internal discussions of California public defenders as to whether they should “prepare” their clients for the judge’s anticipated questions by “reminding” them of the various steps of the Alcoholics Anonymous program.

Public defenders who looked exclusively at the rules seemed inexorably to come to the conclusion that they were not only allowed to so coach their clients, but perhaps were even ethically required to do so. The terms of the California Rules of Professional Conduct do not flatly prohibit informing a client of the usual questions and of what permissible answers might entail. The rules would prohibit coaching in the setting described above only if it is performed (1) with knowledge that the probationer has not in fact attended any meetings; (2) with knowledge that the probationer is not, in fact, on a particular step; and (3) with the intent to induce the client to perjure himself by stating that he is on a given step when in fact he is not.<sup>52</sup> Public defenders who chose to coach their clients took care not to inquire into any of these elements. They characterized their intent as simply that of an advocate who wished to advise her client of an issue that was likely to arise before the tribunal. As a result, the public defenders who

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<sup>49</sup> The information regarding the effect of probation-based Alcoholics Anonymous on California courts is based on Professor Shaun Martin’s personal knowledge through observation, discussions with students, and conversations with practicing attorneys.

<sup>50</sup> See, e.g., RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL. Rules 3-300, 3-310 (1996).

<sup>51</sup> See, e.g., CAL. BUS. & PROF. CODE § 6068(d) (West 1998) (requiring lawyers to employ “such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL. Rule 5-200 (1996) (implementing § 6068(d)).

<sup>52</sup> See RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL. Rule 5-200 (1996). Indeed, as long as the client truthfully testified that he was given a step—whether he had actually attended any of the required meetings or not—there would not even be any perjury to begin with, much less any that the lawyer had wilfully induced.

focused on the literal content of the rules ultimately engaged in conduct that, as in the *L.A. Law* hypothetical, many would consider to be clearly unethical; namely, "coaching" that resulted in deceptive, misleading, and perhaps false testimony about the probationer's alleged participation in Alcoholics Anonymous.

Other California public defenders faced with the same dilemma responded differently. These public defenders examined not only the terms of the ethics rules, but also their goals, the reasons for the contemplated coaching, and the conduct the system expects of a reasonable, objective lawyer. They concluded that the contemplated coaching was intended, improperly, to put words into a witness's mouth that did not, in fact, accurately convey reality. They reasoned that attorneys legitimately concerned that their clients might actually have forgotten the basic precepts of the Alcoholics Anonymous program could effectively jog the clients' memories without the lengthy explication and coaching that would facilitate perjury. The contrasting conclusions reached by the two sets of California public defenders demonstrate the dichotomous results achieved when a lawyer bases her conduct upon the reasons for which she acts rather than upon the mere content of the rules.

Compare this approach to the one taken by the District of Columbia Bar in the ethics opinion that most directly considers the issue of witness coaching.<sup>53</sup> The D.C. Bar addressed the propriety of the conduct of lawyers who prepared testimony for witnesses or suggested answers to witnesses, the basis of which did not first derive from the witnesses themselves.<sup>54</sup> The D.C. Bar's opinion assumed that "the proper focus is indeed on the substance of the witness's testimony which the lawyer has, in one way or another, assisted in shaping; *and not on the manner of the lawyer's involvement.*"<sup>55</sup> The opinion concludes that neither the nature of nor the intent underlying the lawyer's conduct has "significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading."<sup>56</sup>

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<sup>53</sup> See D.C. Bar, Formal Op. 79 (1979) [hereinafter Formal Op. 79]. The Bar issued its opinion based upon provisions that follow MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980) and that were substantially identical to the provisions of the Model Rules.

<sup>54</sup> Formal Opinion 79 specifically addressed whether lawyers could themselves write direct testimony of witnesses for submission to administrative agencies and, more broadly, "the ethical limitations on a lawyer's suggesting the actual language in which a witness's testimony is to be presented." Formal Op. 79, *supra* note 53.

<sup>55</sup> *Id.* (emphasis added).

<sup>56</sup> *Id.*

The D.C. Bar's approach stems from a literal reliance on the *mens rea* elements of the D.C. Bar Code of Professional Responsibility.<sup>57</sup> The difficulty with the decision, of course, is that the lawyer who wishes to help the client present false or misleading evidence can easily do so without "knowing" of its falsity. So long as the focus is, in the D.C. Bar's words, "not on the manner of the lawyer's involvement,"<sup>58</sup> the lawyer can justify his complicity on the simple basis of loyalty to the client's interests.

The D.C. Bar's analytical regime would immunize lawyers who contemplate coaching (such as the California public defenders) from the need for introspection. The D.C. Bar opinion suggests that even if an attorney deliberately coaches precisely in order to shape and/or distort her client's testimony, the lawyer still does not act unethically so long as the attorney does not know that the resulting testimony is untrue. This focus radically conflicts, we assert, with the deeper personal analysis that should govern the conduct of attorneys.<sup>59</sup>

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<sup>57</sup> See D.C. BAR CODE OF PROFESSIONAL RESPONSIBILITY (1972). The Code was in effect at the time of Formal Opinion 79. The D.C. Bar did not adopt the ABA's Model Rules of Professional Conduct until the mid-1980s. See *Preface to D.C. BAR RULES: APPENDIX A. RULES OF PROFESSIONAL CONDUCT* (1998).

<sup>58</sup> Formal Op. 79, *supra* note 53.

<sup>59</sup> The deficiency of the D.C. Bar's approach is exemplified by common coaching practices in civil discovery. Lawyers in pretrial settings typically use pre-existing documentary evidence to prepare clients and witnesses for their depositions. See THEODORE Y. BLUMOFF ET AL., *PRETRIAL DISCOVERY: THE DEVELOPMENT OF PROFESSIONAL JUDGMENT* § 67, at 188 (1993) (discussing deposition preparation). Recognizing that jurors emphasize the significance of such documents, lawyers sometimes attempt to dissuade friendly witnesses from offering testimony that conflicts with the written records. Some lawyers also assume that jurors will believe even false testimony, so long as it is not contradicted by contemporaneous documents. Accordingly, it is common practice for such lawyers to encourage a witness to review key documents produced during discovery (and transcripts of earlier testimony) before his deposition. The witness can thus predict what the other side can, and cannot, safely contend. The witness may, perhaps, then respond falsely to the questions he is asked.

The lawyer, of course, owes a duty to help the witness avoid surprise. See, e.g., *id.* § 67, at 182-85 (preparing friendly witnesses for depositions is a lawyer's pretrial duty); A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 323-24 (1998). We do not mean to suggest that preparing a witness is *per se* improper, nor do we dispute that showing the witness documentary evidence can have legitimate aims. In reality, however, the information that the lawyer provides often is designed to enable the witness to respond creatively to the available documentary evidence. Witnesses can feel



An exclusive reliance upon the literal content of the ethics rules does have one potential advantage. By equating legal ethics with mere compliance with express ethical prohibitions, the system perhaps would advance a rough degree of adversarial equality. The duty of loyalty, one might argue, requires every attorney to advance the interests of his client to the maximum degree possible so long as this conduct is not barred by expressly codified ethical commands. The arguable advantage of such a regime is that particular clients will not be disadvantaged in the adversarial process because they employ an "ethical" counsel (who fails, for example, to coach them through the questionable means described above) while confronting an unethical counterpart who employs these means and yet complies with express ethical commands.<sup>60</sup>

The rules, however, do not in fact attempt to ensure such equality of unethical behavior, nor should they. The professional codes expressly and repeatedly allow and encourage lawyers to engage in discretionary moral decisionmaking even if their adversary does not share a similar ethical view.<sup>61</sup> An equality rationale thus does not appear to motivate the contemporary ethical focus. We should not prefer an alternative regime in any event; it seems bizarre to set the ethical bar at its absolute lowest in an effort to convince no attorney to rise above it. This is not, we think, what it means to be a legal professional, much less one with moral and ethical discretion.

Our point is a simple one. Coaching, like many other tactics and conduct in litigation settings, is not—and perhaps cannot be<sup>62</sup>—fully

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relatively safe in articulating untrue claims so long as their testimony does not conflict with the written evidence. Attorneys who "coach" their clients or witnesses to fashion a story that is consistent with the written record can simultaneously foster the introduction of false testimony while remaining ignorant of the true set of facts. Under the D.C. Bar Opinion's approach, lawyers are justified in introducing the altered testimony on the grounds that the lawyers do not "know" that it is false. *See* Formal Op. 79, *supra* note 53.

<sup>60</sup> This dilemma is discussed in Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 182-83 (1996) (discussing difficulties in having lawyers apply different roles to different clients).

<sup>61</sup> *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.16, 2.1, 3.3(c) (1998).

<sup>62</sup> As Wigmore noted long ago:

[T]o prevent the abuse by any definite rule seems impracticable.

It would seem, therefore, that nothing short of an actual fraudulent conference for concoction of testimony could properly be taken notice of;

addressed in the codes.<sup>63</sup> That arises in part because professional code drafters cannot conceive of and address all issues and in part because the propriety of even identical conduct may vary from case to case.<sup>64</sup> The consequence of that reality is that lawyers cannot rely fully on the terms of the codes in resolving ethical issues that arise.<sup>65</sup> Deciding how to conduct “trial work within ethical boundaries established by court rules, ethical codes, and other statutes”<sup>66</sup> is the easy part of the litigator’s job. The hard part is remembering that identifying ethical practice goes far beyond that task.

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there is no specific rule of behavior capable of being substituted for the proof of such facts.

2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §788 (2d ed. 1923).

<sup>63</sup> Cf. Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 705 (1991) (“The Code fails to impose any significant limit on a lawyer’s conduct in preparing his own witnesses for trial, with the result that the propriety of the lawyer’s conduct must be defined primarily by criminal laws dealing with subornation of perjury.”) (footnotes omitted).

<sup>64</sup> See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 261 (1993) (discussing the relationship between specificity in code provisions and their ability to cover a broad range of conduct).

<sup>65</sup> Cf. Zacharias, *supra* note 31, at 1327-50 (discussing some of the many contexts in which the codes terms provide only limited guidance for lawyer conduct).

<sup>66</sup> Letter from Susan David Dwyer, *supra* note 1.

